

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEE HELFER	:	CIVIL ACTION
	:	
v.	:	
	:	
MARRIOTT INTERNATIONAL, INC.,	:	
ET AL.	:	NO. 06-726

MEMORANDUM

Padova, J.

February 8, 2007

Plaintiff Lee Helfer has brought this negligence lawsuit against Marriott International, Inc. and Springhill SMC Corporation to recover for injuries he allegedly sustained as a result of being bitten by bed bugs during a stay at the Springhill Suites Marriott Hotel in Plymouth Meeting, Pennsylvania. Currently before the Court is Plaintiff's Motion to Compel Discovery and for Sanctions, pursuant to Federal Rule of Civil Procedure 37, in which Plaintiff moves for an order compelling Defendants to produce proper Rule 30(b)(6) deponents and to produce documents requested in a deposition. Plaintiff also requests appropriate sanctions, including costs and attorneys' fees, for having to file this motion. For the reasons that follow, Plaintiff's motion is granted in part and denied in part.

I. FACTS

On October 16, 2006, we granted a motion by Plaintiff seeking leave to amend his complaint to rename Marriott International, Inc. ("Marriott") as a defendant in this action. Subsequently, during a telephone conference with counsel for all parties in November 2006, we permitted Plaintiff to proceed with limited discovery on the issue of the relationship between Defendants Marriott and Springhill SMC Corporation ("Springhill SMC"). This discovery was to include not only the corporate relationship between these two entities, but also the operational relationship, namely

whether and to what extent Marriott exercises control over Springhill SMC. Following this conference call, Plaintiff served Marriott with a Notice of Deposition on December 1, 2006.¹ Plaintiff stated in the notice that the examination was requested for the purpose of obtaining information relating to the relationship between Marriott, Springhill SMC, and the Springhill Suites Marriott Hotel in Plymouth Meeting, Pennsylvania (the “Hotel”). Marriott had designated Jeff B. Stant, Assistant Secretary of Marriott, pursuant to Rule 30(b)(6). Mr. Stant was deposed on two occasions, first on November 16, 2006, and second on January 9, 2007.

Plaintiff also served Springhill SMC a Notice of Deposition on December 1, 2006, stating that the examination was requested to discover facts known to Springhill SMC as averred in Plaintiff’s Amended Complaint, and the defenses presented in Defendant’s responses thereto. Springhill SMC designated Tim Pastuszek, the manager of the Hotel, pursuant to Rule 30(b)(6). Mr. Pastuszek was deposed on December 18, 2006.

II. LEGAL STANDARD

Rule 30 of the Federal Rules of Civil Procedure addresses the appointment of corporate designees:

A party may in the party’s notice and in a subpoena name as the deponent a . . . private corporation . . . and describe with reasonable particularity the matters on which examination is requested. . . . [T]he organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.

Fed. R. Civ. P. 30(b)(6). Rule 30(b)(6), therefore, imposes a duty on a corporation to name one or

¹The notice stated that Plaintiff would continue the oral deposition of Jeff Stant, an individual designated by Marriott to be the Corporate Representative to testify on its behalf.

more persons who consent to testify on its behalf and who are able to testify as to matters known or reasonably available to the corporation. Barron v. Caterpillar, Inc., 168 F.R.D. 175, 176 (E.D. Pa. 1996) (citing Charles A. Wright, et al., Federal Practice & Procedure § 2103 (1994)). When a corporate designee lacks sufficient knowledge of the relevant facts to provide adequate responses to the discovering party's requests, the corporation bears the burden of presenting an additional designee capable of providing sufficient answers. Id. at 177.

III. DISCUSSION

A. Deposition of Mr. Stant

Plaintiff contends that Mr. Stant was not a proper Rule 30(b)(6) designee because he was not able to testify to matters known or reasonably available to Marriott concerning the relationship between Marriott, Springhill SMC, and the Hotel. Plaintiff argues that Mr. Stant only possessed knowledge of the corporate relationship between Marriott and Springhill SMC (i.e. that Springhill SMC was a wholly-owned subsidiary of Marriott), and did not have any knowledge of the “practical working relationship” between these two entities. Specifically, Plaintiff contends that Mr. Stant lacked knowledge of whether Marriott issued policies or procedures regarding hotel management either directly to the hotels or to its wholly-owned subsidiaries, which in turn would manage hotels in accordance with Marriott's directives. Plaintiff also contends that Mr. Stant had no knowledge of Marriott press releases or statements on Marriott's corporate intranet that represented that Marriott managed the Hotel. Defendants respond by arguing that Mr. Stant testified as to the relationship between Marriott and Springhill SMC when he testified that Springhill SMC is a wholly-owned subsidiary of Marriott. Defendants further assert that they did not receive any indication from Plaintiff that he was seeking the deposition of a Marriott representative with “knowledge of the

practical working relationship” between Marriott and Springhill SMC.

We find Defendants’ assertion that they were not aware that Plaintiff sought information beyond merely the corporate relationship between Marriott and Springhill SMC (namely, that Springhill SMC is a wholly-owned subsidiary of Marriott) difficult to believe. There was no need for Defense Counsel to intuit the meaning of Plaintiff’s request or to use anything other than plain English to understand what Plaintiff is seeking through this discovery. Plaintiff seeks discovery of any operational relationship, such as whether Marriott directs policies and practices to hotels directly or by establishing such policies and practices for its wholly-owned subsidiaries, which then implement the policies and practices at the various brand-name hotels. A review of Mr. Stant’s deposition testimony illustrates that he lacked knowledge of such an operational relationship. For example, after questioning Mr. Stant regarding a decision by Marriott to initiate a company-wide make-over of bedding, a decision that Mr. Stant said he would have knowledge of only by reading about it in a bulletin, Stant Dep. 158:24-25, the following colloquy ensued:

Q: Do you know if Marriott did make the decision to do that [implement a company-wide make-over of bedding] or say any other decision that they wanted to do company-wide with all of the brand name hotels, would the brand name hotels have to follow that decision?

A: That really isn’t my area. I don’t know. If you read the announcement, some ways you would infer from that that that’s how it happens.

Stant Dep. 159:2-11. Mr. Stant’s admission that he lacked knowledge as to whether brand name hotels would be required to implement a decision by Marriott illustrates that he was unable to testify to matters known or reasonably available to Marriott concerning the relationship between Marriott, Springhill SMC, and the Hotel as required by Rule 30(b)(6). Also, Mr. Stant’s lack of knowledge regarding representations, either through press releases or the Marriott intranet, that the Hotel is

managed by Marriott further indicates that he was not an appropriate corporate designee. Consequently, Plaintiff is entitled to a corporate designee from Marriott to testify as to the operational relationship (or as Plaintiff has described, the “practical working relationship”) between Marriott, Springhill SMC, and the Hotel.

B. Deposition of Mr. Pastuszek

Plaintiff contends that Mr. Pastuszek was not a proper Rule 30(b)(6) designee because he had knowledge of bed bugs only as it related to the particular hotel that he managed, and had no knowledge of bed bugs as it relates to the other hotels managed by Springhill SMC. Plaintiff also contends that Mr. Pastuszek was not aware of alleged Marriott-sponsored bed bug training and information sessions attended by Springhill SMC employees other than himself, and did not know whether any of the Springhill SMC managed hotels possessed the information on bed bugs from such meetings prior to Plaintiff’s stay at the Hotel. Plaintiff asserts that Mr. Pastuszek’s only information concerning Springhill SMC’s knowledge of bed bugs infestations came from an email provided by Defense Counsel based on information she obtained from the Marriott claims department, and that Mr. Pastuszek had no information regarding how the content of the email was obtained. Plaintiff also asserts that Mr. Pastuszek did not have any knowledge of training or inspection procedures concerning bed bugs at any of the Springhill SMC managed hotels. Finally, Plaintiff contends that Mr. Pastuszek believed that there was an agreement between Marriott and the owners of the Springhill SMC managed properties that gave those properties the right “to fly the Marriott flag,” but that he had no knowledge of such an agreement.

Defendants contend that Mr. Pastuszek testified about an investigation into prior reports of bed bugs at any Springhill Suites by Marriott hotel managed by Springhill SMC, and about how the

investigation took place. Defendants further maintain that Mr. Pastuszek did testify as to the overall operation of Springhill SMC as it concerned all 22 Springhill SMC managed properties, but that he could not testify as to the exact procedures used at each hotel by the technicians employed by Ecolab, the company with whom Springhill SMC's contracts for pest control services, because such information would only be known by the manager of each hotel.

Plaintiff's assertion that Mr. Pastuszek only had knowledge of the particular hotel he managed, and lacked knowledge of the information regarding other Springhill SMC managed properties, is not supported by the deposition testimony. In response to Plaintiff's question regarding Springhill SMC's knowledge of bed bugs, Mr. Pastuszek replied: "I'm not aware of – of – the only knowledge that I could give you is that, at the time of this claim, Springhill SMC managed 22 hotels, and there were no incidents of bed bugs at any of the properties." Pastuszek Dep. 8:5-9. This response evidences that Mr. Pastuszek did possess knowledge relating to all of the Springhill SMC managed properties, not just the hotel he managed. In response to a question asking him what he did to learn about Springhill SMC's knowledge of bed bugs, Mr. Pastuszek testified, "I received an email from the Claims Department informing me that they had been asked to do a physical research and – computer research in regard to any reports, or claims of bed bugs made at our Springhill Suites managed hotels." Pastuszek Dep. 17:3-8. Thus, the deposition testimony does indicate that Mr. Pastuszek's knowledge of the fact that there were no other incidents of bed bugs was obtained from an email. However, the manner in which Mr. Pastuszek prepared to testify about information known or reasonably available to Springhill SMC is immaterial. Furthermore, Plaintiff's assertion that the email was provided by Defense Counsel, and that Mr. Pastuszek did not know how the information in the email was obtained is not supported by his deposition testimony. According to

Mr. Pastuszek, he received the email from someone in the Claims Department. Pastuszek Dep. 17:3-

4. Plaintiff questioned Mr. Pastuszek about the investigation:

Q: And how did they perform their search?

A: They searched their database.

Q: And what did their database consist of?

A: Consists of claims or any – any – any claim that occurred or any incident that occurred at any of our 22 properties.

Pastuszek Dep. 18:8-15. The record does reflect that Mr. Pastuszek did not know the location of the claims office, that Defense Counsel had requested the search, what the scope of the search was, that Margaret Dakan had sent the email to Mr. Pastuszek, and that the claims office is Marriott International Administrative Services, Inc. located in Bethesda, Maryland.² However, these gaps in Mr. Pastuszek's knowledge do not lead us to conclude that he was unable to testify regarding matters involving the other Springhill SMC properties and that his knowledge only concerned the particular hotel he managed.

Mr. Pastuszek was able to provide other testimony regarding information known or reasonably available to Springhill SMC, and which was not limited to the particular hotel he managed. For example:

Q: Do you know what policies, if any, Springhill SMC Corporation had in force at the time of Mr. Helfer's incident as it relates to bed bugs? Did they have any policies in force for their 22 managed hotels?

A: There were not policies in place as it relates to bed bugs.

Q: And how do you know that?

²This information was supplied by Defense Counsel during the deposition. Pastuszek Dep. 19:18-20:5.

A: There – there is a policy that Marriott – all Springhill Suites, as well as any franchisee and the corporation, anybody that flies our flag, is required to obtain a pest control company of their choice. But it is a requirement that they have a pest control company.

Pastuszek Dep. 24:9-24. Additionally,

Q: Does Ecolab have any procedures in place at the 22 Springhill SMC Corporation managed properties to inspect for bed bugs prior to a bed bug incident occurring, and that's today?

A: Today, when we – they come out to inspect – to treat the hotel, which is typically monthly, they do look at everything in their entire room while they are treating – while they are doing their monthly preventive maintenance.

Q: Does that include an inspection procedure for bed bugs?

A: To my knowledge, they do. They check everything in the room now.

Q: And this is at all 22 hotels?

A: Yes

Q: And how do you know this?

A: Because the – in that documentation that was provided to us by – by Ecolab, that explains that they – they're – they're looking for that in the guest rooms.

Pastuszek Dep. 47:4-24.

The record does indicate the Mr. Pastuszek was not able to answer questions regarding a meeting in 2002 between representatives of Marriott, Springhill SMC, and others, attended by Mr. Bodo, the chief engineer at the Hotel, on the topic of bed bugs. Plaintiff's counsel questioned Mr. Pastuszek several times during the deposition on this topic:

Q: Were you aware that there was a meeting in 2002 of the head of the Engineering Department of brand name Marriott Hotels that Mr. Bodo attended, and the topic of the meeting was bed bugs? Were you aware of that meeting?

A: No, I was not.

Q: Were you aware that Mr. Bodo had the same documentation that Mr. Watts [an employee of Ecolab] provided, and Mr. Bodo had this information in 2002, and had all of the documentation on bed bugs? Did you know that?

A: To the – to the best of my knowledge, representing 430 Plymouth Road, that – that information came out after Mr. Helfer's incident. Mr. Helfer's incident was in February –

Q: of 2004.

A: – of 2004

Q: Right

A: So, to the best of my knowledge, that information that was provided by Ecolab, came out after Mr. Helfer's incident.

Q: Yeah. But my question was; did you know that Mr. Bodo had the same information in 2002? He had the same documentation.

A: No, I did not know.

Q: Do you know if any of the other 22 Springhill SMC Corporation had the bed bug documentation prior to Mr Helfer's incident?

A: I don't have that answer.

Pastuszek Dep. 48:11-49:20. This questioning illustrates that Mr. Pastuszek was unable to answer questions regarding Springhill SMC's knowledge of any meeting and whether any of the Springhill SMC managed hotels possessed information from such a meeting prior to the Plaintiff's stay at the Hotel. Because such information should be reasonably available to Springhill SMC, Plaintiff is entitled to depose a Springhill SMC designee who does possess such knowledge.

Plaintiff's contention that Mr. Pastuszek was not a proper Rule 30(b)(6) designee because he did not know the inspection procedures for bed bugs used at each of Springhill SMC's 22 managed properties is without merit. Plaintiff's counsel asked Mr. Pastuszek if he knew Ecolab's

inspection procedures at each of the 22 Springhill SMC managed properties. Pastuszek Dep. 49:21-23. Mr. Pastuszek responded that he could not answer in detail. Pastuszek Dep. 49:24. Mr. Pastuszek also testified that he could not say step-by-step every single thing that the Ecolab technician does. Pastuszek Dep. 49:6-7. Mr. Pastuszek was able to testify, more generally, concerning past and present inspection policies of Springhill SMC as they relate to bed bugs. For example:

Q: Do you know what policies, if any, Springhill SMC Corporation had in force at the time of Mr. Helfer's incident as it relates to bed bugs? Did they have any policies in force for their 22 managed hotels?

A: There were not policies in place as it relates to bed bugs.

Q: And how do you know that?

A: There – there is a policy that Marriott – all Springhill Suites, as well as any franchisee and the corporation, any that flies our flag, is required to obtain a pest control company of their choice. But it is a requirement that they have a pest control company.

Q: So, now today, as we sit here, there is no inspection procedures (sic) that Springhill SMC Corporation has in place for its managed hotels regarding bed bugs?

A: We – we hire – each hotel is responsible for hiring a pest elimination company –

Q: Huh-huh.

A: – and documentation was put together by our largest pest elimination company, which is Ecolab, and they have provided training materials which – which you have seen before, that was given at the previous deposition, in order to bring about knowledge of the bed bugs in the industry, and it clearly states procedures, and what is to occur if bed bugs are found.

Pastuszek Dep. 24:9-25:16. We find that information regarding the detailed procedures followed by Ecolab's technician at each of the 22 Springhill SMC managed properties to be information not reasonably available to Springhill SMC. This information would have to be obtained through

deposing an Ecolab representative or possibly the managers of the individual properties. Consequently, Mr. Pastuszek was not an improper 30(b)(6) designee because of a lack of knowledge regarding particular inspection procedures.

Finally, the fact that Mr. Pastuszek speculated that there must be an agreement between Marriott and the owners of the individual hotels managed by Springhill SMC and that he did not have any knowledge of such an agreement does not make him an improper 30(b)(6) designee. Such an agreement may not exist, or, as the agreement is alleged to be between Marriott and the hotel owners, not Springhill SMC, Springhill SMC may not have knowledge of such an agreement. Thus, questions regarding such an agreement would be more appropriately addressed to Marriott or the owners of the property and not to Springhill SMC.

For the reasons stated above Plaintiff's motion requesting an order compelling Springhill SMC to produce a proper Rule 30(b)(6) deponent is denied. However, Plaintiff may request additional discovery from Springhill SMC regarding meetings and/or training sessions dealing with bed bugs in which Springhill SMC employees participated and that took place prior to the incident in question.

C. The email from Ms. Dakan and the instructions relayed to her by Defense Counsel

Plaintiff also seeks discovery of the email sent by Ms. Dakan to Mr. Pastuszek that formed the basis of his knowledge regarding bed bugs at Springhill SMC managed properties, and the information and instructions provided to Ms. Dakan by Defense Counsel as to the scope of Ms. Dakan's search. Defendants deny that the Plaintiff is entitled to such discovery, they state that the information contained in the email has been provided to plaintiff's counsel at the deposition of Mr. Pastuszek, and they assert that the email contains privileged information.

Defendants are ordered to provide to the court a copy of the email from Ms. Dakan to Mr. Pastuszek for an in camera inspection to determine the applicability of the asserted privilege. With respect to the instructions provided to Ms. Dakan by Defense Counsel, we find that this information is protected by the work product doctrine. In determining the applicability of the work product doctrine, the United States Court of Appeals for the Third Circuit has considered the nature of the information sought, the extent to which it may reveal directly or indirectly the attorney's mental processes, the degree of danger that it will convert the attorney from advocate to witness, and the degree of availability of the information from other sources. United States v. Amerada Hess Corp., 619 F.2d 980, 987-88 (3d Cir. 1980). In this case, the discovery of the information and instructions from Defense Counsel to Ms. Dakan would reveal the attorney's thoughts and impressions, and we note that Plaintiff is able to obtain substantially equivalent information, namely the scope and method of Ms. Dakan's investigation, by other means.

D. Conclusion

We have considered Plaintiff's request for sanctions pursuant to Rule 37(a) and 37(d) and find that sanctions are not appropriate at this time. See Newman v. GHS Osteopathic, 60 F.3d 153, 156 (3d Cir. 1995) (holding that district courts have discretion in awarding sanctions under Rule 37). We note, however, that the papers filed by counsel in this discovery dispute as well as the deposition transcripts reveal a lack of civility and professionalism on the part of the attorneys in this matter. We refer counsel to the Code of Pretrial Conduct published by the American College of Trial Lawyers. Code of Pretrial Conduct, (Am. Coll. of Trial Lawyers 2002). The Code recognizes that a lawyer's role is to zealously advance the legitimate interests of his or her clients, while maintaining appropriate standards of civility and decorum. Id. ¶ 4(a). The Code further states that lawyers

should treat all other lawyers courteously, and should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Id. ¶ 4(a)-(b). Counsel should be aware that this court ordinarily addresses inappropriate conduct of counsel at the conclusion of a case, and intends to do so in this matter.

An appropriate order follows.

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ORDER

AND NOW, this 8th day of February, 2007, upon consideration of Plaintiff's Motion to Compel Discovery and for Sanctions (Docket No. 56), and all papers filed in connection therewith, **IT IS HEREBY ORDERED** that said motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Plaintiff's motion requesting an order compelling Marriott International, Inc. to produce a proper Rule 30(b)(6) deponent is **GRANTED**. Defendant Marriott International, Inc. is ordered to identify within 5 days a proper Rule 30(b)(6) deponent(s) who is able to testify as to the operational relationship between Marriott International, Inc., Springhill SMC, Inc., and the Springhill Suites Marriott Hotel in Plymouth Meeting, Pennsylvania.³
2. Plaintiff's motion requesting an order compelling Springhill SMC to produce a proper Rule 30(b)(6) deponent is **DENIED**. Plaintiff may request additional discovery from Springhill SMC regarding meetings and/or training sessions concerning bed bugs in which Springhill SMC employees participated and which took place prior to the incident in question.

³The parties are reminded of this Court's Order of November 28, 2006 requiring that depositions taken by the Plaintiff be held in the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, under the supervision of Magistrate Judge Timothy R. Rice. The parties shall contact Magistrate Judge Rice's Chambers to arrange for a date and time for the deposition of the Marriott corporate designee.

3. Defendants are ordered to provide the court within 5 days a copy of the email from Ms. Dakan to Mr. Pastuszek that Defendants claim contains privileged information.
4. Plaintiff's motion for an order compelling Defendants to disclose the information and instructions provided by Defense Counsel to Ms. Dakan is **DENIED**.
5. Plaintiff's request for sanctions is **DENIED**.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.